Bank Utama (M) Bhd v Seri Mayhua Sdn Bhd & Ors

HIGH COURT (MIRI) — SUIT NO 22–79 OF 1999
SULAIMAN JC
14 OCTOBER 2000

Civil Procedure *— Affidavits — Defective affidavit — Authority to affirm affidavit — Affidavit affirmed in personal capacity as witness — Whether person other than plaintiff can affirm affidavit — Rules of the High Court 1980 O 41*

Civil Procedure *— Appeal — Time — Notice of appeal to be issued within the five day period — Calculation of time — Whether weekly holiday should be excluded — Rules of the High Court 1980 O 56 r 1*

The plaintiff ('the appellant') had applied, by summons in chambers, for an order under O 14 of the Rules of the High Court 1980 ('the RHC') to enter final judgment against the second defendant ('the second respondent'). This was supported by, inter alia, the affidavit in reply of Chan Chew Guan ('the affidavit'), a former officer of the appellant. The second respondent objected on the admissibility of the affidavit. The respondent stated that Chan Chew Guan was not authorized by the appellant to affirm the affidavit. The respondent further submitted that if an affidavit was affirmed by a person other that the plaintiff, it must state that the deponent was authorized to affirm such an affidavit, to which the appellant argued that Chan Chew Guan affirmed the affidavit in his personal capacity as a witness. The learned deputy registrar, inter alia, ordered the affidavit be inadmissible and struck out with costs to the second respondent. At the hearing of the appeal, the second respondent raised a preliminary objection that the notice of appeal was issued out of time in breach of O 56 r 1 of the RHC, stating that the decision concerned was made on 7 April 2000 and the notice of appeal was issued only on 13 April 2000, exceeding the five day period. The respondent contended that the five day period should run from 8 April 2000 as it was a Friday, while the appellant argued that 8 and 9 April 2000 should be excluded.

Held, dismissing the preliminary objection and allowing the appeal with costs to the appellant:

(1) It was not disputed that 9 April 2000 which falls on Sunday is the weekly holiday for the state of Sarawak and should be excluded by virtue of O 3 r 2(5) of the RHC in reckoning the five days period within which the notice of appeal should be issued. Having excluded the said 9 April 2000, it is clear that the notice of appeal was issued within the prescribed period and as such the court dismissed the preliminary objection on this ground alone. Further, the court also agreed with the learned counsel for the appellant that 8 April 2000, being the day before a weekly

holiday, should also be excluded in reckoning the said period (see pp 172I–173A). A

(2) The need to give affidavit evidence in an interlocutory application such as the instant case is well illustrated by Clement Skinner JC in the case of *Syarikat Ting Mui Sdn Bhd v Muthusamy a/l Settapan and other appeals* [1999] 6 MLJ 622 where his Lordship stated that authority is not prerequisite to swearing an affidavit. The court was in agreement with the view expressed by the learned judge in so far as the deponent made the affidavit in his personal capacity for the purpose of giving evidence which is within his personal knowledge to support or deny any statement or particulars deposed in other affidavits affirmed on behalf and with the authorization of a party to any cause or matter (see pp 175E, H, 176B). The affidavit was thus not defective and was admissible for the purpose of the said application. B C

[**Bahasa Malaysia summary** D

Plaintif ('perayu') telah memohon, melalui saman dalam kamar, bagi satu perintah di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk memasukkan penghakiman akhir terhadap defendan kedua ('penentang kedua'). Ini disokong oleh afidavit membalas Chan Chew Guan ('afidavit tersebut'), seorang bekas pegawai kepada perayu. Penentang kedua membantah kebolehterimaan afidavit tersebut. Penentang menyatakan bahawa Chan Chew Guan tidak diberi kuasa oleh perayu untuk mengesahkan afidavit tersebut. Penentang juga berhujah bahawa jika suatu afidavit disahkan oleh seseorang selain daripada plaintif, ia mesti menyatakan bahawa deponen tersebut telah diberikuasa mengesahkan afidavit tersebut. Perayu sebaliknya berhujah bahawa Chan Chew Guan mengesahkan afidavit tersebut dalam keupayaan dirinya sebagai saksi. Pendaftar kanan yang arif mengarahkan afidavit tersebut tidak boleh diterima dan ditolak dengan kos kepada penentang kedua. Ketika perbicaraan rayuan tersebut, penentang kedua membangkitkan satu bantahan permulaan bahawa notis rayuan tersebut dikeluarkan selepas tempoh dan melanggari A 56 k 1 KMT, dan menyatakan bahawa keputusan tersebut dibuat pada 7 April 2000 manakala notis rayuan dikeluarkan hanya pada 13 April 2000, melampaui tempoh lima hari. Penentang berhujah bahawa tempoh lima hari patut bermula dari 8 April 2000 kerana ia hari Jumaat, manakala perayu membalas bahawa 8 dan 9 April 2000 patut dikecualikan. E F G H

Diputuskan, menolak bantahan permulaan dan membenarkan rayuan tersebut dengan kos kepada perayu:

(1) Ia tidak dipertikaikan bahawa 9 April 2000 yang jatuh pada hari Ahad ialah hari kelepasan mingguan bagi negeri Sarawak dan patut dikecualikan menurut A 3 k 2(5) KMT dalam menghitung I

tempoh lima hari tersebut dalam mana notis rayuan tersebut perlu dikeluarkan. Setelah mengecualikan 9 April 2000 tersebut, adalah jelas bahawa notis rayuan tersebut dikeluarkan dalam tempoh yang disyaratkan dan oleh itu mahkamah menolak bantahan permulaan tersebut berdasarkan alasan ini sahaja. Selain itu, mahkamah juga bersetuju dengan peguam perayu bahawa 8 April 2000, kerana merupakan hari sebelum hari kelepasan mingguan, juga harus dikecualikan daripada penghitungan tempoh tersebut (lihat ms 172I–173A).

(2) Keperluan memberi keterangan afidavit dalam satu permohonan interlokutari seperti dalam kes ini diberi contoh yang baik oleh Clement Skinner H dalam kes *Syarikat Ting Mui Sdn Bhd v Muthusamy a/l Settapan and other appeals* [1999] 6 MLJ 622 di mana yang arif hakim menyatakan bahawa permberian kuasa bukanlah satu syarat pengikraran satu afidavit. Mahkamah bersetuju dengan pandangan yang diberi oleh hakim tersebut bahawa deponen membuat afidavit tersebut dalam keupayaan dirinya bagi tujuan memberi keterangan berdasarkan pengetahuannya sendiri untuk menyokong atau menafikan apa-apa kenyataan atau butiran yang dideposkan dalam afidavit-afidavit lain yang disahkan bagi mana-mana pihak atau dengan kuasa satu pihak kepada apa-apa perkara (lihat ms 175E, H, 176B). Oleh itu, afidavit tersebut tidak cacat dan boleh diterima bagi tujuan permohonan tersebut.

Notes

For cases on time to file an appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–293.

For cases on affidavits, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 939–959.

Cases referred to

Chugwin v Russel & Anor 27 The Times Law Report 26 (refd)

MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [1999] 1 AMR 810 (refd)

Syarikat Ting Mui Sdn Bhd v Muthusamy a/l Settapan and other appeals [1999] 6 MLJ 622 (folld)

Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd & Ors [1993] 3 CLJ 667 (refd)

Legislation referred to

Rules of the High Court 1980 O 3 r 2, 3 r 2(2), 3 r 2(5), 14, 41, 56 r 1, O 56 1(3)

Un Pier Liang (*Jimmy HT Wee & Co*) for the plaintiff/appellant.
Kenny Yi (*Yi & Co*) for the defendant/respondent.

Sulaiman J. C: This is an appeal by the plaintiff ('the appellant') under O 56 r 1 of the Rules of the High Court ('the RHC') against the decision of the learned deputy registrar ordering the affidavit in reply of Chan Chew Guan affirmed on 9 November 1999 ('the said affidavit') be inadmissible and struck out with costs to the second defendant.

The appellant has also filed a similar appeal in respect of Civil Suit No 22–80–99 (MR) where the facts and prayers are similar to the present appeal. Both parties have agreed that the decision of this appeal will be binding on the other appeal.

At the hearing of the appeal, the learned counsel for the second respondent raised a preliminary objection that this notice of appeal was issued out of time and is in breach of O 56 r l(3) of the RHC. The learned counsel submitted that since the decision to which the appeal relates was made on 7 April 2000 and the notice of appeal was only issued on 13 April 2000, it had exceeded the five days period within which the notice of appeal should be issued.

Order 56 r 1 (3) of the RHC provides as follows:

> Unless the court otherwise order, the notice must be issued within five days after the judgment, order or decision appealed against was given or made and served not less than two clear days before the days fixed for hearing of the appeal.

Order 3 r 2 of the RHC provides for the reckoning of periods of time under the RHC. As the period for the issuance of the notice of appeal under O 56 r 1(3) is less than seven days, the provisions of O 3 r 2(2) and (5) of the RHC shall apply in reckoning the time limit prescribed there under.

Order 3 r 2(2) and (5) provide as follows:

> (1) …
>
> (2) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.
>
> (3) …
>
> (4) …
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> (5) Where, apart from this paragraph, the period in question, being a period of seven days or less, would include the day before the weekly holiday, the weekly holiday or public holiday, that day shall be excluded.

Learned counsel for the respondent contended that the five days period for the issuance of the notice of appeal should run from 8 April 2000, as that day is a Friday and not a weekly holiday or public holiday and since the notice of appeal was issued on 13 April 2000, it had exceeded the five days limit prescribed therefor by one day. Learned counsel for the appellant, on the other hand, contended that in reckoning the period in question, 8 and 9 April 2000, being the day before a weekly holiday and a weekly holiday respectively, should be excluded. It is not disputed that 9 April 2000 which falls on Sunday is the weekly holiday for the state of Sarawak and should be excluded by virtue of O 3 r 2(5) of the RHC in reckoning the five days period within which the notice of appeal should be issued. Having excluded

the said 9 April 2000, it is clear that the notice of appeal was issued within the prescribed period and as such I can dismiss the preliminary objection on this ground alone. Further, I also agree with the learned counsel for the appellant that 8 April 2000, being the day before a weekly holiday, should also be excluded in reckoning the said period. By reasons aforesaid I dismissed the preliminary objection raised by the respondent on the issue of limitation.

Having disposed of the preliminary objection, I will now deal with the appeal in this application. The facts of the case which led to this appeal can be briefly summarized as follows. The respondent, by summons in chambers dated 18 September 1999, applied under O 14 of the RHC to enter final judgment against the second respondent on the terms set out therein. The application was supported by the affidavit of Wong King Pin, the Branch Manager of the appellant and affirmed on 4 September 1999. In addition thereto, the appellant had also filed in two other affidavits in reply. One was affirmed by the said Wong King Pin and the other affirmed by Mr Chan Chew Guan, a former officer of the appellant. At the hearing of the application before the learned deputy registrar, the second respondent raised two preliminary objections as to the admissibility of the affidavits filed by the appellant. The first objection is on the affidavit of Wong King Pin affirmed on 14 September 1999, and the second on the affidavit of Chan Chew Guan affirmed on 9 November 1999.

The learned deputy registrar dismissed the first objection but upheld the second objection on the affidavit of the said Chan Chew Guan. For ease of reference the affidavit objected to is reproduced as follows:

> I, CHAN CHEW GUAN (K0244602), an audit senior, of full age, of Lot 1684, Piasau Utara, 98000 Miri, Sarawak do hereby solemnly and sincerely affirm and say as follows:
>
> 1 I was a former officer of the Kewangan Utama Bhd at the branch at Lot 279, Jalan Nahkoda Gampar, P O Box 2291, 98008 Miri, Sarawak.
>
> 2 Save where otherwise stated the matters deposed to herein are within my personal knowledge and/or from documents and records of the plaintiffs shown to me which I believe to be true and accurate.
>
> 3 I crave leave to refer to the affidavit in opposition of Datuk Lau Hieng Wui affirmed on 18 October 1999 ('Datuk Lau's affidavit').
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> 4 In response to para 11 of Datuk Lau's affidavit, I aver that the second defendant did sign the guarantee with Kewangan Utama Bhd. At the material time, on or about 21 March 1997 I personally brought over the guarantee document to the office of the second defendant for his signature. I introduced myself as Chan Chew Guan, an officer from Kewangan Utama Berhad. I informed the second defendant that this is the guarantee document pertaining to the guarantee of the first defendant in respect of their hire purchase of the Kobeico Mark V hydraulic excavator. I witnessed the second defendant signing the guarantee before me.
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> 5 In response to para 14 of Datuk Lau's affidavit I aver as follows:
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> (a) At the time when I brought the guarantee personally to the second defendant, I did explain to the second defendant that the document

he is about sign was the guarantee document pertaining to the guarantee of the first defendant in respect of their hire purchase of the said hydraulic excavator.

(b) The second defendant appeared to understand the guarantee document and did not ask for further explanation or clarification. The second defendant then signed the guarantee, returned the guarantee to me and ushered me out of his office.

(c) I verily believe that the second defendant is an experienced and successful businessman, and knew or has been advised that he is not obliged to be a guarantor of the first defendant whether or not he a director or shareholder of the first defendant .

(d) This is not the first guarantee that has been signed by the second defendant. In the course of my employment with Kewangan Utama Bhd, I have, prior to the signing of this particular guarantee, personally brought over approximately 25 other similar guarantee documents pertaining to the guarantee of hire purchase of similar logging equipment by the first defendant wherein I also witnessed the signature of the second defendant before me.

6 In the premises, I aver that the second defendant did sign the guarantee and knew and understood the nature and extent of his undertaking.

The only ground relied on by the respondent in raising the preliminary objection was that the said Chan Chin Guan was not authorized by the appellant to affirm the said affidavit in reply. The question is whether a person affirming an affidavit for any party to any proceedings has to specifically state therein that he had been duly authorized to affirm the same so as to render it admissible for the purpose of the said proceedings. The learned counsel for the appellant submitted that O 41 of the RHC, which deals with affidavits filed in respect of any cause or matter, is silent on the requirement that a deponent must be authorized to swear an affidavit for any party. In support thereof, he cited the case of *Syarikat Ting Mui Sdn Bhd v Muthusamy a/l Settapan and other appeals* [1999] 6 MLJ 622, where it was held that O 41 of the RHC which deals specifically with affidavits filed for use in any cause or matter, is conspicuously silent on any requirement that a deponent must be authorized to swear an affidavit. In that case, the court admitted as evidence the affidavit deposed by a person other than the plaintiff even though the deponent did not state therein that he was duly authorized to affirm the same by the plaintiff.

The learned counsel for the respondent submitted otherwise. He contended that an affidavit affirmed by any person other than the plaintiff himself must specifically state therein that the deponent is duly authorized by the plaintiff to affirm such an affidavit. The learned counsel referred the court to three authorities to that effect. The first being the judgment of Shaik Daud J (as he then was) in the case of *Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd & Ors* [1993] 3 CLJ 667. In that case the deponent, who was the former general manager of the plaintiff, affirmed three affidavits on behalf of the plaintiff to support of its claim based on the authority given to him by one single director of the company. The affidavits so sworn were not considered by the court for the reason that the deponent thereof had no authority to depose any affidavit for the plaintiff. The next

A case referred to is *MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [1999] 1 AMR 810, where an affidavit affirmed by the appellant's tax consultant in support of the plaintiff's notice of motion was held to be inadmissible as there was no mention therein that the deponent was duly authorized to affirm the same on behalf of the plaintiff. The other case relied on by the respondent is *Chugwin v Russel & Anor* 27 The Times Law Report
B 26, where Vaughan Williams LJ stated as follows:

> Where an affidavit in support of a summons under O 14 is sworn by a person other than the plaintiff, he should state his means of knowledge and also the facts that he is authorized to make the affidavits.

C In his reply to the respondent's submission, the learned counsel for the appellant argued that in the instant case the said Chan Chew Guan affirmed the affidavit in his personal capacity as a witness to give evidence on the signing of the guarantee document referred to therein and the event relating to such signing which was made in his presence. The learned counsel further argued that the authorities relied on by the second respondent can
D be distinguished from the facts of the instant case. He submitted that in the authorities so cited, the deponent affirmed the affidavit for and on behalf of the plaintiff in support of its application whereas the affidavit objected to was made by the deponent for the purpose of giving evidence as the appellant's witness.

E The need to give affidavit evidence in an interlocutory application such as the instant case is well illustrated by Clement Skinner JC (as his lordship then was) in the case of *Syarikat Ting Mui Sdn Bhd v Muthusamy a/p Settapan*, where in accepting an affidavit made without specific authorization, he stated at p 631 as follows:

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> It is pertinent to note that by virtue of r 1(4) of the order (ie O 41), an employee of a party to a cause or matter may swear an affidavit but the affidavit must state that fact. There is however no requirement that such employee must go further to state that he is also authorized to swear the affidavit before it can be read in the cause or matter. This shows that authority is not prerequisite to swearing an affidavit. Perhaps the question become clearer by looking at how evidence is adduced in the court at different stages
G of a cause or matter. At a trial, evidence will normally be introduced through the oral testimony of a witness but there is no requirement that before a persons testifies, he must be authorized to do so by the party who calls him. If the authority to testily is not prerequisite at a trial that position must surely not changed just because a matter is at an interlocutory stage when evidence is introduced through affidavit evidence.

H

I am in agreement with the view expressed by the learned judge in so far as the deponent made the affidavit in his personal capacity for the purpose of giving evidence which is within his personal knowledge to support or deny any statement or particulars deposed in other affidavits affirmed on behalf and with the authorization of a party to any cause or matter. However I am
I of the view that where the affidavit is deposed for and on behalf of any party in respect of any matter related to its affairs, business or dealings which is within its exclusive knowledge and is filed in support of any cause or matter,

then the deponent thereof must be authorized by such party to affirm the same. As can be seen in the instant case, the affidavit affirmed by the said Chan Chew Guan is not in its nature an affidavit sworn for and on behalf of the appellant relating to its affairs, business or dealings but was sworn solely for the purpose of adducing evidence within his personal knowledge relating to the signing of a material document which was made in his presence and to other matters related thereto. I don't see any reason why an affidavit filed by the appellant's solicitor to introduce evidence in favour of the appellant should be rendered inadmissible merely for mere want of authorization. I therefore hold that the affidavit of the said Chan Chew Guan affirmed on 9 November 2000 is not defective and is admissible for the purpose of the said application.

In the circumstances, I allowed this appeal with costs, including that of the preliminary objection, to the appellant to be taxed, unless otherwise agreed.

Preliminary objection dismissed. Appeal allowed with costs to the appellant.

Reported by Chew Phye Ken